



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J1421/13

In the matter between:

BEVERAL INVESTMENT

T/A KFC v ALEN FRASER

Applicant

And

ALEN FRASER

First Respondent

MARIA NDZIMA

Second Respondent

Heard: 19 November 2014

Delivered: 28 January 2015.

Summary: Rescission application- rescinding order making the arbitration award the order of the Court in terms of section 158(1) (c) of the LRA. The approach to adopt when dealing with rescission in terms of rule 16A (1) (a) and (b) of the Rules of the Labour Court restated.

JUDGMENT

MOLAHLEHI J

- [1] This is an application to rescind the order obtained in terms of section 158(1)(c) of the Labour Relations Act whereby the default arbitration award in favour of the employee was made an order of Court. The application to have the arbitration award made an order of Court was considered and determined in chambers.
- [2] The arbitration award which had been made an order of Court had been obtained by default. At the time these proceedings were launched, the applicant had already instituted a rescission application of that arbitration award. Those proceedings were subsequently stayed pending the outcome of the present application.
- [3] The application to have the arbitration award made an order of Court was made three months after the rescission application of the arbitration award was filed with the bargaining council.
- [4] The case of the respondent is that the applicant failed to oppose section 158 (1) (c) application despite being aware of it.
- [5] An application for rescission of a judgment or order of Court can be made in term of rule 16A of the Rules of the Labour Court which reads as follows:
- '(1) The court may, in addition to any other powers it may have-
- (a) of its own motion or on application of any party affected, rescind or vary any order or judgment-
- (i) erroneously sought or erroneously granted in the absence of any party affected by it;
- (ii) in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission;
- (iii) granted as the result of a mistake common to the parties, or

- (b) on application of any party affected, rescind or vary any order or judgment granted in the absence of that party.

(2) Any party desiring any relief under-

- (a) subrule 1(a) must apply for it on notice to all parties whose interests may be affected by the relief sought.
- (b) subrule 1(b) may within 15 days after acquiring knowledge of an order or judgment granted in the absence of that party apply on notice to all interested parties to set aside the order or judgment and the court may, upon good cause shown, set aside the order or judgment on such terms as it deems fit.”

[6] It is apparent from the above that the requirements of Rule 16A (1)(a) are different to those of 16A(1)(b). In terms of Rule 16A (1) (a) an applicant in a rescission application has to show that the judgment or order was granted in error in his or her absence. Rule 16A (1) (b) on the other hand requires that the applicant has to show good cause that the judgment or order sought, in order to succeed.

[7] The provisions of Rule 16A (1) (a) of the Rules replicates the provisions of section 165 (a) of the Labour Relations Act of 195 and are also similar to those of rule 42(1) (a) of the Rules of the High Court.

[8] The Court in dealing with the application for rescission under Rule 42(1) of the Rules of the High Court in *Transport and General Workers Union and Others v Kempton City Syndicate and Another*¹ held that:

‘If a court holds that an order or judgment was erroneously granted in the absence of any party affected thereby it should, in terms of rule 42(1)(a), without further enquiry, rescind or vary the order.’

[9] In *Superb Meat Supplies CC v Maritz*,² the Court held that that:

¹ (2001) 22 ILJ 104 (W) at 108C.

² (2004) 25 ILJ 96 (LAC) at para 15.

‘When the court considers whether a judgment has been granted erroneously, it does not investigate whether good cause has been established or whether there has been wilful default.’

[10] This Court confirmed the above in *Gay Transport (Pty) Ltd v SA Transport and Allied Workers Union and Others*³ and in *SA Democratic Teachers Union v CCMA and Others*.⁴ The enquiry which the Court has to conduct in determining whether the order or judgment which is the subject of the rescission application was erroneously made, essentially entails investigating whether there existed a fact, at the time the order or judgment was made, which the Court was not aware of and that had it been aware it would not have made the order as it did.

[11] The error which the applicant relies on in the present matter has to do with the issue of service of the application of the first respondent in terms of section 158(1) (c) of the LRA. The issue of service by fax received attention in *Northern Province Local Government Association v CCMA*,⁵ where the Court in dealing with the issue of service by fax had the following to say:

‘Axiomatically, in deciding whether or not a fax transmission was received, proof that the fax was indeed sent creates a probability in favour of receipt, but does not logically constitute conclusive evidence of receipt... [there has to be] a fair-minded enquiry into whether or not as a fact the notice did not come to the attention of the party.’

[12] It is now well established that production of a fax slip as proof of service creates a presumption of receipt but does not constitute conclusive proof of receipt.⁶

[13] In the present instance, whilst there is no dispute about the transmission of the fax notifying the applicant about the section 158(1) (c) application, there is, however, a dispute as to whether the service was received by the applicant.

³ (2011) 32 ILJ 1917 (LC) at paras 11–12.

⁴ (2007) 28 ILJ 1124 (LC) at para 17.

⁵ (2001) 22 ILJ 1173 (LC) at para 46.

⁶ *Gay Transport (Pty) Ltd v SA and Allied Workers Union and Others* (2011) 32 ILJ 1917 (LC).

[14] In the absence of proof of receipt of the service, it means that, the order made by the court was erroneously made. In other words, had the court been aware that the applicant did not receive the application to make the arbitration award an order of court, it would not have made the order as it did.

[15] In the circumstances, I am of the view that the order made by this court on 16 September 2014 stands to be rescinded. It follows from this that the contempt application also stands to fail. I do not, however, believe that it would be appropriate to allow costs to follow the results.

[16] In the premises, the following order is made:

1. The order made by this Court on 16 September 2014 is rescinded.
2. The respondents in the contempt of Court application are not guilty of contempt.
3. There is no order as to costs.

Molahlehi, J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: T. Lethetsa of Moodie & Robertson

For the Respondent: Advocate S Saunders

Instructed by: Fluxmans Attorney

LABOUR COURT